

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WEST,

Defendant-Appellant.

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UNPUBLISHED  
November 26, 2002

No. 222686  
Wayne Circuit Court  
LC No. 98-011795

ON REMAND

Before: Kelly, P.J., and Hood and Zahra, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that "[u]pon careful review of the record, it is clear the trial court mentally separated the evidence admitted against Coleman from that admitted against defendant when rendering the verdict[.]" a conclusion that is not consistent with the conclusion reached by this panel in our prior opinion. I further disagree with the majority's conclusion that any error that exists was harmless error. I would reverse defendant's conviction.

I do not dispute that the trial court, acting as a trier of fact, is presumed to recognize the distinction between admissible and inadmissible evidence. Nonetheless, in a bench trial the court is under an obligation to render findings of fact and conclusions of law that are supported by the evidence properly admitted in the case. In this case, the trial court articulated one set of factual findings applicable to both defendant and Coleman. The trial court in its findings of fact repeatedly used the statements made by Coleman to ascertain defendant's intent to commit second-degree murder. Such findings were inappropriate.

The trial court's sole finding that separated defendant from Coleman related to defendant's statement to police. The trial court found that defendant admitted in his statement that he had knowledge that the victim was in the house, and possessed the intent to at least scare the victim. However, neither defendant's statement, nor any other admissible evidence presented at trial, supported this finding. Defendant's statement indicated that he did not know anyone was in the house when it was set on fire.

Further, to the extent the trial court improperly considered Coleman's statements against defendant, I cannot conclude that such error was harmless "because the evidence against defendant was overwhelming." I conclude the properly admitted evidence offered against defendant was insufficient as a matter of law.

The majority holds:

Here, even excluding Coleman's statements, the evidence established beyond a reasonable doubt that defendant aided and abetted in the commission of second-degree murder. Defendant went with Coleman to a vacant field to pick up something that smelled of gasoline. Coleman told defendant that he was going to burn down a house and had been paid an "eight ball" to do so. On their way to the house, Coleman asked defendant to serve as a lookout. Defendant knew which house was to be burned when Coleman kept walking around it. Defendant waited and watched as Coleman circled the house, lit a rag, and threw a glass jar inside a small hallway of the house. When defendant saw flames, he "took off running."

The above referenced evidence does not establish defendant was an aider and abettor to Coleman's crime. Viewed in the light most favorable to the prosecution, the admissible evidence established only that Coleman, without the assistance of defendant: (1) negotiated a scheme of arson for pay; (2) obtained gasoline; (2) made the firebomb; and (3) set the victim's home on fire with the firebomb. Defendant admitted that he accompanied Coleman as Coleman committed these acts. However, Michigan has long held that mere presence at a crime, even with knowledge that an offense is being committed, is not sufficient to make the actor an aider and abettor. *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931); *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983). The fact that Coleman asked defendant to be his lookout does not establish defendant's agreement to act in the crime. In order to sustain defendant's conviction, there must be some evidence presented that would establish that defendant acquiesced to Coleman's request, or otherwise performed acts or gave encouragement that assisted in the commission of the crime. No such evidence exists in the record.

In sum, the trial court properly ruled that Coleman's statements were inadmissible against defendant. See *People v Schutte*, 240 Mich App 713, 717; 613 NW2d 370 (2000), citing *People v Poole*, 444 Mich 141, 151; 506 NW2d 505 (1993). Either the trial court failed to distinguish the inadmissible evidence presented in the case against defendant and, therefore, impermissibly relied on Coleman's statement to support the conviction of defendant, or, if we assume the trial court "mentally separated" the evidence admitted against Coleman from the evidence admissible against defendant, then there was insufficient evidence to support defendant's conviction. I would reverse defendant's conviction.

/s/ Brian K. Zahra